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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/057,212	01/24/2002	Nico N. Raczek	01/016 NUT	1719

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EXAMINER

SAYALA, CHHAYA D

ART UNIT PAPER NUMBER

1761

DATE MAILED: 09/01/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/057,212

Applicant(s)

RACZEK, NICO N.

Examiner

C. SAYALA

Art Unit

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 17 August 2005.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1,4-8 and 12-14 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1,4-8 and 12-14 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____

DETAILED ACTION

Continued Examination Under 37 CFR 1.114

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 8/17/2005 has been entered.

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

1. Claims 1, 4-8, 12 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

In claim 1, "supplementary feedstuff" is undefined in the specification and therefore is of indeterminate scope.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

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(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

2. Claims 1, 4-8, 12 and 13 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Spanier et al. (US Patent 4904494).

Spanier et al. teaches making a dog snack which may include a preservative in the amount 0.01 to 4 weight percent. Sorbic acid is listed as one of seven specified suitable preservatives. See col. 8, paragraph 7. See MPEP 2112 (Requirements of Rejection based on inherency; Burden of proof).

Something which is old does not become patentable upon the discovery of a new property. The claiming of a new use, new function or unknown property does not necessarily make the claim patentable. In re Best, 562 F.2d 1252, 1254, 195 USPQ 430, 433 (CCPA 1977).

This rejection is being made under both statutes because of applicant's amendment specifying agricultural livestock feedstuffs. Although the reference teaches sorbic acid in a pet food, and in the same amount, one of ordinary skill in

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the art would reasonably expect the same result in any other foodstuff including the livestock feedstuff. Claims 4-8 are rendered obvious since all are animals. Claim 12 would be inherent. Claim 13 is anticipated since grains are used in dog food also.

3. Claims 1, 4-8, 12 and 13 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over EP 0071331.

The patent teaches adding sorbic acid to a food product that includes grains such as grain wheat, barley or oats (see page 6, line 18). Also, page 9 discloses ingredients such as vitamins and other nutrients. See page 10 that teaches sorbic acid in not more than 1% by weight.

This rejection is being made under both statutes because of applicant's amendment specifying agricultural livestock feedstuffs. Although the reference teaches sorbic acid in a pet food, and in the same amount, one of ordinary skill in the art would reasonably expect the same result in any other foodstuff including the livestock feedstuff. Claims 4-8 are rendered obvious since all are animals. Claim 12 would be inherent. Claim 13 is anticipated since grains are used in dog food also.

4. Claims 1, 4-8, 12 and 13 are rejected under 35 U.S.C. 102(b) as being anticipated by DE 3704175

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The patent abstract teaches a mixture of sorbic acid in an amount of 0.05 - 5 wt. percent, which would include the amount claimed, and silage in the production of storable fodder for feeding herbivorous and omnivorous animals, which disclosure anticipates animals such as pigs and cattle, and renders the rest obvious. Claim 12 is inherent.

5. Claims 1, 4-8, 12 and 13 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over DE 3701567

Feedstuff is mixed with sorbic acid in an amount of 0.15 to 5.0 wt. percent and need for cattle and pigs. The constituents of the feedstuff are not disclosed by the abstract, but silage or fodder is commonly added as animal feedstuff, and such would have been obvious. Claim 12 is inherent.

6. Claims 1, 4-8, 12 and 13 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Ueno et al. (US Patent 4444796).

Ueno et al teach adding a fine powder of sorbic acid to pet foods that contain acid mixes (see col. 5, lines 20-22; col. 5, lines 37-40). The recipe at example 2 teaches starch hydrolyzate, potato starch and soybean meal. The sorbic acid is added in an amount of 0.1-0.7 percent (see col. 6, line 10) and as a powder having a particle size of 300 to 1500 microns.

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This rejection is being made under both statutes because of applicant's amendment specifying agricultural livestock feedstuffs. Although the reference teaches sorbic acid in a pet food, and in the same amount, one of ordinary skill in the art would reasonably expect the same result in any other foodstuff including the livestock feedstuff. Claims 4-8 are rendered obvious since all are animals. Claim 12 would be inherent. Claim 13 is anticipated since grains are used in dog food also.

7. Claim 14 is rejected under 35 U.S.C. 103(a) as being unpatentable over EP 0071331, Spanier, DE 3704175 or DE 3701567 in view of Ueno et al. (4172897 and 4444796).

The primary references are as discussed above. They do not teach the size of sorbic acid particles. Ueno et al. ('796) teach that commercially available sorbic acid has a particle size of 833-147 microns. Ueno et al ('897) teach that when sorbic acid has a particle size of 300 microns or more so that it improves the solubility of sorbic acid (see col. 1, lines 29 plus and col. 2, lines 29 plus). It would have been obvious to use such commercially available sorbic acid for convenience as well as the benefit of easy solubility.

To optimize the size of the particles so that more than 50% is below 555 microns, when 300 microns or more is beneficial, as well as commercially available 833-147 micron size, would have been within the ambit of ordinary skill.

Response to Arguments

Applicant's arguments filed 8/17/2005 have been fully considered but they are not persuasive.

Applicants arguments state that the claims are to a new method of using old composition, that the '494 patent requires gelatin and other additives and that it does not teach livestock feed. The position of the office is that the addition of sorbic acid to foodstuff or feed was shown by prior art for its preservative effect, which applicant's claiming the growth stabilizing effect would have been inherent, and that "some thing which is old does not become patentable upon the disclosure of a new property".

Conclusion

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to C. SAYALA whose telephone number is 571-272-1405.

The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through

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Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



C. SAYALA
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